STATE OF MICHIGAN

COURT OF APPEALS

THOMAS MULLANEY and LYNN MULLANEY,

Plaintiffs-Appellees,

v

OLE C. KISTLER, D.O., KISTLER CLINIC, P.C., PHILLIP HOLMES, D.P.M., VICKI ANTON-ATHENS, D.P.M., P.C., STEVEN J. SERRA, D.O., STEVEN J. SERRA, D.O., P.C., HENRY FORD HEALTH SYSTEM, HENRY FORD HEALTH SYSTEM HOME HEALTH CARE, DIANE SMALLEY, IVONYX, INC., COMPLETE INFUSION CARE, INC., and HORIZON HOME CARE, d/b/a FOCUS HEALTH CARE,

Defendants,

and

LABORATORY CORPORATION OF AMERICA, and HEALTH ALLIANCE PLAN OF MICHIGAN,

Defendants-Appellants.

UNPUBLISHED
November 4, 2003

No. 239806
Wayne Circuit Court
LC No. 01-105655-NH

Before: Gage, P.J., and White and Cooper, JJ.

PER CURIAM.

Defendants Laboratory Corporation of America (LabCorp) and Health Alliance Plan of Michigan (HAP) appeal by leave granted the denial of LabCorp's motion for summary disposition, in which HAP joined below. LabCorp and HAP argue that summary disposition should have been granted because plaintiffs failed to file an appropriate affidavit of merit under MCL 600.2912d and MCL 600.2169. We affirm.

I

Defendants contend that plaintiffs' action should have been dismissed because the affidavit of merit of Dr. Gerald McGrory, a board-certified pharmacist, failed to comply with MCL 600.2192d. We disagree.

We review de novo the circuit court's denial of defendants' motion for summary disposition. *Mouradian v Goldburg*, 256 Mich App 566, 570; 664 NW2d 805 (2003). We also review de novo the interpretation of a statute. *Donajkowski v Alpena Power Co*, 460 Mich 243, 248; 596 NW2d 574 (1999). MCL 600.2912d(1) sets forth the requirements for an affidavit of merit filed in a medical malpractice action:

> . . . The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:
>
> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.

A

Dr. McGrory's affidavit of merit stated:

1. That he is a pharmacist duly licensed to practice in the State of Pennsylvania and is board-certified.

2. That he has reviewed the Notice of Intent filed by the attorney for the claimant.

3. That he has reviewed all of the records supplied to him by claimant's attorney concerning the allegations contained in the Notice.

4. That in his opinion, the applicable standard of care required as follows:

> A. Health Alliance Plan and Laboratory Corporation of America should have made arrangements such that claimant's gentamycin peak and trough levels were accurately obtained and reported in a timely manner.
>
> B. Ivonyx, Inc./Complete Infusion Care, Inc., acting through its pharmacist, Diane Smalley initially should not have dispensed such a high dose of gentamycin for this patient.

> C. Ivonyx, Inc./Complete Infusion Care, Inc., acting through its pharmacist, Diane Smalley should not have recommended continuing the same dose of gentamycin on August 28, 1998 without first obtaining a set of accurate gentamycin peak and trough levels.
>
> D. Ivonyx, Inc./Complete Infusion Care, Inc., acting through its pharmacist, Diane Smalley should have recommended discontinuing claimant's gentamycin following the September 3, 1998 gentamycin laboratory results.
>
> 5. That, in his opinion, the applicable standard of care and management of Thomas Mullaney was violated and breached by Ivonyx, Inc./Complete Infusion Care, Inc., pharmacist, Diane Smalley, Health Alliance Plan and Laboratory Corporation of America resulting in the permanent and irreparable damage to Thomas Mullaney's kidneys and 8th cranial nerve.

The circuit court concluded that the affidavit substantially complied with MCL 600.2912d(1).

B

The affidavit of merit complied with the statutory requirement that the affiant have reviewed the pre-suit notice and the plaintiffs' attorney records. Although not separately enumerated, the affidavit complied with the requirements that it contain opinions concerning the applicable standard of care, that the standard of care had been breached, and proximate causation of injury. The affidavit failed to strictly comply with § 2912d, in that while it alleged negligent conduct by LabCorp, and that HAP breached the applicable standard of care, it lacked a detailed statement of the actions that LabCorp and HAP should have taken to comply with the standard of care, and lacked a statement of the manner in which the breach proximately caused plaintiff Thomas Mullaney's injuries. On the other hand, when read as a whole, it is clear that the affiant opines that the standard of care required that HAP and LabCorp make arrangements such that plaintiff's gentamycin peak and trough levels were accurately obtained and reported in a timely manner, that this standard was violated, i.e., that defendants failed to make arrangements such that plaintiff's gentamycin peak and trough levels were accurately obtained and reported in a timely manner, and that the failure to make arrangements such that plaintiff's gentamycin peak and trough levels were accurately obtained and reported in a timely manner caused permanent and irreparable damage to plaintiff's kidneys and eighth cranial nerve.

We conclude that, although flawed, the affidavit was not "grossly nonconforming" as contemplated in *Mouradian, supra* at 573-574 (concluding that affidavit that did not contain requisite statements of malpractice, and failed to contend that defendant doctor breached any standard of care, was "grossly nonconforming" such that statute of limitations was not tolled).[1]

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[1] Our conclusion is also in keeping with *Scarsella v Pollak,* 232 Mich App 61, 64; 591 NW2d 257 (1998), aff'd 461 Mich 547; 607 NW2d 711 (2000), in which this Court held that "for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without

(continued…)

The affidavit substantially complied with the statutory requirements of MCL 600.2192d and thus dismissal was not warranted. See *VandenBerg v VandenBerg*, 231 Mich App 497, 500-503; 586 NW2d 570 (1998); see also *Ericson v Pollak*, 110 F Supp 2d 582 (ED MI, 2000).

II

Defendants argue next that Dr. McGrory, the pharmacist who supplied the challenged affidavit of merit, was not qualified to do so under MCL 600.2192d and 600.2169. We disagree.

A

This court reviews de novo issues involving the interpretation of a statute. *Donajkowski, supra*, 460 Mich 248. MCL 600.2912d(1) provides in pertinent part:

> Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional *who the plaintiff's attorney reasonably believes meets the requirements* for an expert witness under section 2169. . . . [Emphasis added.]

Section 2169 provides:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
>
> (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

(…continued)

the required affidavit of merit is insufficient to commence the lawsuit." As the Supreme Court noted in its affirmance, *Scarsella* addressed "only the situation in which a medical malpractice plaintiff wholly omits to file the affidavit required by MCL 600.2912d(1)." *Scarsella*, 461 Mich at 553. In a footnote, the Supreme Court added, "We do not decide today *how* well the affidavit must be framed. Whether a timely filed affidavit that is grossly nonconforming to the statute tolls the statute is a question we save for later decisional development." *Id.* at 553 n 7. [Emphasis in original.]

(i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.

(ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

* * *

(2) Qualifications of expert witness; criteria. In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:

(a) The educational and professional training of the expert witness.

(b) The area of specialization of the expert witness.

(c) The length of time the expert witness has been engaged in the active clinical practice of instruction of the health profession or specialty.

(d) The relevancy of the expert witness's testimony.

B

Plaintiffs' complaint alleged that negligence occurred, inter alia, in the delay in obtaining and reporting of the laboratory reports. Defendant LabCorp is a clinical laboratory, not a doctor. Dr. McGrory's curriculum vitae indicates that he was Director of Pharmaceutical Services at Phoenixville Hospital, Phoenixville, Pennsylvania, where he was responsible for coordinating staff and management functions to ensure provision of high quality pharmaceutical services. His curriculum vitae sets forth his twenty-year history of running pharmacy operations in two hospitals and a pharmacy management corporation, and also that he supervised the intravenous lab pharmacy" at the Wilmington Medical Center in Wilmington, Delaware. The curriculum vitae states that from 1986 to present, Dr. McGrory has held a number of university teaching positions as a clinical instructor of pharmacy. Plaintiffs' counsel submitted an affidavit attesting that he reasonably believed Dr. McGrory was an appropriate professional to render an expert opinion regarding LabCorp and HAP, because the issues involving these defendants were such that a pharmacist or medical doctor was required to evaluate the laboratory reports submitted regarding the administration of the antibiotic. Plaintiffs' counsel's affidavit further stated that the key issues in this case involved "the timing and the information contained in the laboratory reports and that this information is solely reviewable by a Clinical Pharm D or doctor of medicine." The circuit court agreed.

Bearing in mind that the statutory standard is the attorney's reasonable belief, we conclude under these circumstances that plaintiffs' attorney reasonably believed that Dr. McGrory was qualified under § 2169 such that there was compliance with MCL 600.2912d.

Because the affidavit of merit substantially complied with MCL 600.2912d and because plaintiffs' attorney reasonably believed the affiant was qualified under MCL 600.2169 to provide an affidavit of merit, the filing of the affidavit and the complaint and summons served to properly commence this action within the statute of limitations. The circuit court did not err in denying defendants' motion for summary disposition.

Affirmed.

/s/ Hilda R. Gage
/s/ Helene N. White
/s/ Jessica R. Cooper